No. 15,896

IN THE

United States Court of Appeals

For the Ninth Circuit

MORRIS ALBERT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Alaska, Fourth Judicial Division.

BRIEF FOR APPELLEE.

GEORGE M. YEAGER,
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Fairbanks, Alaska,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction of the District Court was invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 967, as amended May 24, 1949, c. 139, sec. 114, 63 Stat. 105; 28 U.S.C. 2255.

Jurisdiction of this Court was invoked pursuant to the Act of June 25, 1948, c. 646, 62 Stat. 967, as amended May 24, 1949, c. 139, sec. 114, 63 Stat. 105; 28 U.S.C. 2255.

COUNTERSTATEMENT OF THE CASE.

On the 14th day of February, 1956, an indictment was returned by the grand jury for the Fourth

Judicial Division, District of Alaska, charging the appellant with the crime of robbery, in violation of Section 65-4-24 of the Alaska Compiled Laws Annotated, 1949. On February 15, 1956, District Judge Vernon D. Forbes appointed Eugene V. Miller, a member of the local and territorial bar, to represent the appellant. Thereafter, on the same day, appellant was arraigned in the District Court for the District of Alaska, Fourth Judicial Division, and entered a plea of not guilty.

On the 14th day of May, 1956, the trial was held in the District Court, wherein the appellant was represented by Mr. Miller, and a verdict of guilty was returned by the jury. On May 21, 1956, District Judge Vernon D. Forbes committed the appellant to the custody of the Attorney General or his authorized representative for a period of fifteen years. On May 29, 1956, appellant filed a notice of appeal with the Clerk of the District Court, but no further action was taken to perfect the appeal.

On May 28, 1957, Judge Vernon D. Forbes entered an order denying appellant's motion under 28 USCA §2255 to vacate the sentence. (See appendix.)

On June 21, 1957, the Ninth Circuit Court of Appeals denied appellant's "Petition for Motion of De Novo".

On November 5, 1957, the appellant filed a motion to vacate his sentence in the office of the Clerk of the District Court for the District of Alaska, Third Judicial Division. The Honorable J. L. McCarrey, Jr.,

District Judge for the Third Judicial Division, entered a minute order on November 15, 1957, transferring the motion to Fairbanks, Alaska, for the reason that the defendant was tried and sentenced in the Fourth Judicial Division.

Judge Forbes entered an order on November 27, 1957, denying appellant's second motion to vacate the sentence. (See appendix.)

Appellant has appealed to this Court from the denial of his second motion to vacate the sentence.

QUESTION PRESENTED.

Whether the District Court erred in not entertaining appellant's second motion made pursuant to 28 USCA §2255 to vacate the sentence.

ARGUMENT.

THE DISTRICT COURT WAS NOT REQUIRED TO ENTERTAIN APPELLANT'S SECOND MOTION TO VACATE THE SENTENCE.

On May 28, 1957, the Honorable Vernon D. Forbes, District Judge for the Fourth Judicial Division, entered an order denying appellant's first motion to vacate his sentence on the grounds that a consideration of the motion and an examination of the files and records of the case conclusively showed that appellant was entitled to no relief. Judge Forbes had appointed counsel for the appellant and presided at the trial. Appellant did not appeal from the Court's

order of May 28, 1957, but on November 5, 1957, filed another motion with the Clerk of Court in the Third Division at Anchorage, Alaska. After the second motion was transferred to Fairbanks, on November 27, 1957, the District Court for the Fourth Judicial Division, entered an order denying this motion to vacate for the reason that the sentencing court, in its discretion, was not required to entertain a second or successive motion under 28 USCA §2255 for similar relief on behalf of the same prisoner. *Bickford v. United States,* 206 F.2d 395 (9th Cir. 1953); *Moss v. United States,* 177 F.2d 438 (10th Cir. 1949); *Shobe v. United States,* 220 F.2d 928 (8th Cir. 1955); *United States v. Brown,* 207 F.2d 310 (7th Cir. 1953).

The appellant in his brief has failed to set forth any facts, which would support his contention that the District Court abused its discretion.

Substantially the allegations and conclusions pleaded in his second motion were presented to the Court in his first motion. The appellant should have presented facts to the Court, not merely his conclusions. *United States v. Trumblay,* 234 F.2d 273, 275 (7th Cir. 1956).

Appellant further alleges that a hearing should have been granted and he should have been present. The District Judge found from the first motion and the files and records of the case that the prisoner was entitled to no relief; therefore, it was not necessary to have a hearing. If the Court finds a hearing is

necessary, then, only when there are substantial issues of fact as to events in which the prisoner participated it is necessary for the trial Court to require his production for the hearing. *United States v. Hayman,* 342 U.S. 205, 223 (1952).

Appellant in his brief and motions presents many criticisms which are not supported by the record.

CONCLUSION.

It is respectfully submitted that the order of the District Court denying to entertain appellant's second motion under 28 USCA §2255 should be affirmed.

Dated, Fairbanks, Alaska,
April 30, 1958.

GEORGE M. YEAGER,
United States Attorney,
JAY A. RABINOWITZ,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

In the District Court for the District of Alaska
Fourth Judicial Division

No. 2126 Cr.

United States of America,
Plaintiff,
vs.
Morris Albert,
Defendant.

ORDER

The defendant in the above entitled case, being a prisoner in custody under sentence of this Court, has filed what I will treat as a Motion to Vacate, set aside or correct the sentence of this Court; the Motion being filed, I believe, under the provisions of 28 U.S.C., Section 2255.

I have carefully considered said Motion and have examined the files and records of the case, all of which conclusively show that the prisoner is entitled to no relief and I, therefore, respectfully deny said Motion.

Done at Fairbanks, Alaska, this 28th day of May, 1957.

/s/ Vernon D. Forbes,
District Judge.

208 Fed. Rep. 2d Series, page 902
222 Red. Rep. 2d Series, page 45
224 Fed. Rep. 2d Series, page 866
234 Fed. Rep. 2d Series, page 835

Filed. In the District Court, Territory of Alaska, 4th Div., May 28, 1957.
John B. Hall, Clerk.
By /s/ G. B. Swenson,

In the District Court for the District of Alaska
Fourth Judicial Division

No. 2126 Cr.

United States of America,
Plaintiff,
vs.
Morris Albert,
Defendant.

ORDER

On February 18, 1957, defendant, in the above entitled case, filed in this Court three documents, respectively captioned: "Petition for Disqualification of Judge", "Petition for Change of Venue" and "Petition of Motion to Vacate Sentence". The Court treated defendant's "Petition of Motion to Vacate Sentence" as a motion made pursuant to 28 U.S.C.A., §2255 and by Order made and entered on May 28, 1957, denied defendant's "Petition of Motion to Vacate Sentence". Simultaneously, defendant's "Petition for Change of Venue" was in substance and effect denied, as this Court in treating defendant's "Petition of Motion to Vacate Sentence" as a motion made under 28 U.S.C.A. §2255, was the Court required to determine the motion.[1] Defendant's "Petition for

[1]28 U.S.C.A., §2255 provides in part: "A prisoner in custody under sentence of a court established by Act of Congress . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence":

Disqualification of Judge" was in substance and effect also denied at that time as defendant made no showing in support of this petition.[2]

Thereafter on September 9, 1957, defendant filed a second "Petition of Disqualification of Judge". No affidavit or statement containing facts and reasons in support of defendant's Petition was filed, the Petition itself contained, in full, the following language:

> "I hereby ask you to disqualify yourself from my forthcoming Petition of this case and commitment No. 2126 Cr.".

On December 12, 1957, the Court entered an Order denying defendant's second "Petition of Disqualification of Judge".

Thereafter, defendant filed in the office of the Clerk of the District Court for the District of Alaska, Third Judicial Division, on November 5, 1957, in the above entitled case, a "Petition to Vacate Sentence", "Brief of Disqualification" and "Brief". By Minute Order made and entered on November 15, 1957, the Honor-

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[2]See §54-2-1, A.C.L.A., 1949 which provides in part:

"Fifth. Whenever any party, or any attorney for any party, to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or his attorney or in favor of any opposite party, or attorney for an opposite party, to the suit, and that it is made in good faith and not for the purpose of delay. Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed within one day after such action, suit, or proceeding is at issue upon a question of fact, or good cause shall be shown for the failure to file it within such time. No party or attorney shall be entitled to file more than one such affidavit in any case. The provisions of this subdivision shall apply only to the District Court. See also, 28 U.S.C.A., §455."

able J. L. McCarrey, Jr., District Judge, upon his own motion, ordered that:

> "... the motion to vacate sentence is hereby transferred to Fairbanks, Alaska for hearing for the reason defendant was tried and sentenced in Fairbanks".

Title 28 U.S.C.A., §2255 provides in part:

> "The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner".

Defendant's current "Petition to Vacate Sentence" and "Brief" in support thereof raise substantially the same grounds presented in his first "Petition to Vacate Sentence". Again treating this Petition as a motion made pursuant to 28 U.S.C.A., §2255 and exercising the discretion given by virtue of the above quoted portion of 28 U.S.C.A., §2255, defendant's current "Petition to Vacate Sentence" will not be entertained by this Court.[3]

As to defendant's "Brief of Disqualification" (treated herein as a motion to disqualify the undersigned), defendant has failed to allege any facts or reasons in support thereof.

It Is Hereby Ordered that defendant's "Petition to Vacate Sentence" dated October 18, 1957, be Denied.

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[3]*Moss v. United States,* 1949, 177 F.2d 438; *Dunn v. United States,* 1956, 234 F.2d 219; *Corcoran v. United States,* 1956, 231 F.2d 449; *United States v. Sanders,* 1955, 138 F.Supp. 192; *Jackson v. United States,* 1955, 224 F.2d 556.

It Is Hereby Further Ordered that defendant's "Brief of Disqualification" be Denied.

Done at Fairbanks, Alaska, this 27th day of November, 1957.

/s/ Vernon D. Forbes
United States District Judge

Filed. In the District Court, Territory of Alaska, 4th Div., Nov. 27, 1957.

John B. Hall, Clerk.
By /s/ Kleve Rae Wiegand,
Deputy.

ALASKA COMPILED LAWS ANNOTATED, 1949.

§65-4-24. *Robbery: Larceny from person.* That whoever, by force or violence, or by putting in fear, steals and takes from the person of another anything of value, is guilty of robbery, and shall be imprisoned in the penitentiary not more than fifteen years nor less than one year; and whoever, otherwise than by force and violence or by putting in fear, shall steal and take from the person of another anything of value, shall be imprisoned in the penitentiary not exceeding five years nor less than one year.

UNITED STATES CODE ANNOTATED.

28 §2255. *Federal custody: remedies on motion attacking sentence.*

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be